No. 80-1083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BARNEY'S CLUB, INC. and SPARKS NUGGET, INC.
d/b/a JOHN ASCUAGA'S NUGGET
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION,
LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could be defeated by petitioners' subsequent withdrawal from a multiemployer bargaining unit.

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence.

3. Whether the Board's finding that petitioners promulgated and maintained illegal and overbroad no-solicitation rules was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 623 F. 2d 571. The decisions and orders of the National Labor Relations Board are reported at 227 NLRB 414 (Barney's Club, Inc.) and 230 NLRB 275 (Sparks Nugget, Inc.).

JURISDICTION

The judgment of the Court of Appeals relating to Barney's Club, Inc. was entered on August 18, 1980. The judgment of the Court of Appeals relating to Sparks Nugget, Inc. was entered on September 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This respondent did not receive a copy of the petition until January 2, 1981.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7***;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees***."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in such unfair labor practice, the Board *** shall have power to issue and cause to be served upon such a person a complaint stating the charges *** and containing a notice of hearing ***: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. ***."

STATEMENT OF THE CASE

The brief of the National Labor Relations Board in Opposition herein accurately states the case.

ARGUMENT

I

THIS PETITION REITERATES ARGUMENTS ALREADY MADE TO THIS COURT

Predictably, petitioners' initial argument is an attempt to convince this Court that these cases are somehow different from those already determined. See, for example, *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge,* 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979) (United States Supreme Court No. 78-1379) and *Sahara-Tahoe Corporation v. N.L.R.B., et al.,* 581 F.2d 767 (9th Cir., 1978) *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979) (United States Supreme Court No. 78-1465). Most recently, the same argument was presented in *Silver Spur Casino v. N.L.R.B. et al.,* and related cases, United States Supreme Court No. 80-660. No amount of characterization will allow petitioners to escape the fact that the underlying dispute in all these cases arose from the disintegration of the same multiemployer bargaining unit and the subsequent refusal of all member employers to bargain with the Union, and that the so-called "objective considerations" advanced by the employers to justify their refusal to bargain were virtually the same in each case.

This Court's rationale in denying certiorari in those cases is equally applicable here. The "conflict" which peti-

tioners seek to create did not exist when the prior petitions were considered, nor does it exist now. After recognizing, in conformity with all other circuits, that the Union was availed of the presumption of continued majority support, the Board and court found that petitioners failed to rebut the presumption by establishing a good faith reasonable doubt of the Union's status sufficient to justify their refusal to bargain. The court found the petitioners' evidence, cumulatively and separately, to be "ambiguous" and "equivocal". (Pet. App. 10)[1] No court of appeal absolves petitioners from the responsibility to produce cogent, unequivocal evidence as the factual predicate for refusing to bargain with the Union.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CREATED BY THE COURT'S HOLDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE

The court below correctly recognized that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees

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[1]As with the petitions from other employers, petitioners' contention here that the "Board, with Court approval, ignored" certain evidence is hyperbole. (Pet. 8) The Board and court below patiently considered the evidence and found it "ambiguous" and "equivocal." A more realistic explanation of the Board and court's treatment of petitioners' showing is that unsubstantiated assertions were not treated as facts.

Nor may petitioners truthfully suggest that the cumulative weight of its "evidence" was not considered. The court emphasized that it had viewed the cumulative "evidence" and still found it deficient. (Pet. App 10)

gave rise to a continuing presumption of the Union's majority support among those employees. (Pet. App 5-6).[2] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond. *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951), cited with approval in *N.L.R.B. v. Burns Security Service*, 406 U.S. 272 n.2 (1972).

On this predicate,[3] the court of appeal adopted the reasoning of *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293 at 303, (Pet. App. 7) that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing:

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[2]The court stated its reliance on *N.L.R.B. v. Tahoe Nugget, supra; N.L.R.B. v. Nevada Lodge, supra; Sahara Tahoe Corp. v. N.L.R.B., supra; N.L.R.B. v. Sierra Development Co.*, 604 F.2d 606 (9th Cir., 1979); *N.L.R.B. v. Carda Hotels*, 604 F.2d 605 (9th Cir., 1979). See also, *N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3rd Cir., 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2nd Cir., 1973).

[3]Petitioners' continued assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargaining relationship (Pet. 12) is without foundation. There was no concatenation of presumptions applied here, only the single presumption based on petitioners' voluntary acts of recognition.

> employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted)

No case cited by petitioners militates against application of the presumption in the present situation. In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (2nd Cir., 1979) (Pet. 8), the court *adopted* the presumption of continued majority support described above, and emphasized that rebuttal of the presumption required "clear and convincing evidence of loss of Union support", more than "unfounded speculation or . . . subjective state of mind." *Id.* at 1271. In finding that the employer had presented sufficient objective evidence to rebut the presumption, the court relied heavily on an antiunion petition signed by three-fourths of the employees in the appropriate unit. *Id.* at 1272. No such objective evidence was presented here.

W & W Steel Co. v. N.L.R.B., 599 F.2d 934 (10th Cir., 1979) (Pet. 9), a case petitioners claim is "on all fours" with the present dispute, involved a successor employer's obligation with respect to an ongoing collective bargaining relationship. The court emphasized that the "critical question" was that of the employer's status as a "successor" and its decision was predicated on that status. *Id.* at 936-938. Clearly, no such issue exists here, where the petitioner's obligation to bargain with the Union resulted from

their own acts of recognizing the Union as the representative of a majority of their employees when petitioners joined the multiemployer bargaining unit.

Petitioners' reliance on *N.L.R.B. v. Randle-Eastern Ambulance Service, Inc.* 584 F.2d 720 (5th Cir., 1978) (Pet. 10) further demonstrates the fallacy in their argument. In that case, the presumption of continued majority support was applied. To rebut the presumption, the employer presented unequivocal evidence which established a lack of majority support. Acknowledging that it was a "close case", the court found that the presumption had been rebutted. Here, the Board and court employed the same legal standard, but found that petitioners failed to present the requisite unequivocal evidence and hence, failed to rebut the presumption. (Pet. App. 10).

Nor is *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 10) in conflict with the Board or court's holding. As petitioners acknowledge, in *Kaase*, the recognition of the union was based upon an election of employees within a multiemployer unit rather than by voluntary recognition, as here. In the *Kaase* situation, the union must receive a majority of votes of the participating employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive votes of a majority of the employees of each individual employer member of the multiemployer unit. In the present case, the presumption was not derived from the union majority in the multiemployer unit, but rather from petitioners' acts of voluntarily recognizing the Union as the majority representative of their

employees. Petitioners' reliance on *Kaase* is unavailing. Certainly, no case cited by petitioners holds that the presumption of continued majority support should not be applied here: the purported "conflicts in the circuits" is imaginary.

In essence, petitioners' argument is nothing more than a quibble about the sufficiency of its evidentiary presentation in an attempt to rebut the presumption of continued majority support. Petitioners disguise this quibble as an argument that the Board created an "irrebutable presumption." (Pet. 14). Thus, petitioners confuse the concept of "irrebutable presumption" with their failure to produce sufficient evidence to rebut the presumption. In adopting the reasoning of *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772, the court below acknowledged that:

> ". . . the cumulative weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such thread, the web of circumstances is like the Cheshire cat's grin—nothing behind it."

Petitioners' argument is thus reduced to a claim that the Board and court erred in the evidentiary weight accorded each of the asserted objective considerations, since similar

factors, *once established* in cases from other circuits, had been held to justify a refusal to bargain. (Pet. 6-12). In overlooking the fact that their "evidentiary" showing never rose to the level of objective factors, petitioners effectively confess that they engaged in brinksmanship to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioner's disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

The comment of the court below, to which petitioners allude as support for their contention that there is "conflict in the circuits", is merely an acknowledgment that the presumption is not irrebuttable and that presentation and proof of valid objective considerations will justify a refusal to bargain.[4] However, such evidence was not presented here. The court recognized that requiring such an evidentiary showing facilitated attainment of the Act's underlying purpose: industrial peace. (Pet. App. 15).

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[4]The court below stated that cases from other courts "*may* have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases." (Pet. App. 14-15. See, Pet. 6.)

III

THE BOARD'S FINDING THAT PETITIONERS PROMULGATED AND MAINTAINED ILLEGAL NO-SOLICITATION RULES IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Petitioners' effort to create conflict where none exists is further evident in their argument regarding their no-solicitation rules. (Pet. 19-28). Petitioners concede, as they must, that a rule prohibiting employee solicitation during nonworking time in nonwork areas is presumptively invalid in the absence of legitimate special circumstances warranting adoption of such a rule. *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 803 n.10, (1945), also *N.L.R.B. v. Magnavox Co.,* 415 U.S. 322, 325, *reh. denied* 416 U.S. 952, (1974) (Pet. 19). Petitioners cite and thereby accept the rationale of *Peyton Packing Company,* 49 N.L.R.B. 822 at 833-834 (1940) which held, in pertinent part:

> "It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

Petitioners contend that Nevada's regulation of its gambling industry is a "special circumstance" which permits them to promulgate broad, restrictive, no-solicitation rules.

Although petitioners contend that they submitted "evidence that the Nevada gaming industry requires a specialized set of rules regarding in-house employee solicitation" (Pet. 19), in reality, no such evidence was produced nor does it exist. What petitioners submitted was a hodge podge of Nevada regulations concerning such matters as work permits for "gaming employees" (Pet. 22), and a requirement that casinos exclude persons "of notorious or unsavory reputations" or convicted felons. (Pet. 22). By definition, these regulations have nothing to do with employees represented by the Union.[5] None of the statutes cited by petitioners are relevant to the no-solicitation issue, nor have petitioners even attempted to explain how permitting off-duty employees to exercise their guaranteed rights at limited times and locations would arguably transgress any Nevada statute or infringe on "legitimate security purposes."

Moreover, petitioners' arguments are particularly hollow in light of the fact that the Board and court *agreed* that petitioners could ban all solicitations in the gambling areas of their establishments. The Board stated (Pet. App. 52):

> "Thus, Respondent [petitioners here] could lawfully ban all solicitation in the gambling area, but it could

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[5]Nevada Revised Statute, § 465.335(1)(a), provides that the term "gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages." This is precisely the group of employees represented by the Union (Pet. App. 101).

> not lawfully maintain a general ban on solicitation in the public bars or restaurant."

While the court adopted the Board's rationale in finding the no-solicitation rules improper, it found the Board's order to be overbroad, and modified it to insure that any solicitation must be in nonpublic areas. (Pet. App. 19).[6] Even assuming *arguendo* that "special circumstances" existed, the decision properly defined the boundaries of a no-solicitation rule in conformity with the decisions of this Court. Petitioners' argument is actually a suggestion that they be able to ban all employee solicitations on their premises regardless of the circumstances. The Board and court's rejection of this suggestion was not a product of a refusal to consider evidence, but rather, a rejection of petitioners' weak and irrelevant presentation.

Petitioners' final argument that the Board and court "failed to consider whether alternate means of communication . . . existed by which the Union could advance its message" is misleading for two reasons (Pet. 24-28). First, this issue was never raised at any stage of the NLRB proceedings nor before the court of appeals. Petitioners' failure to raise this issue prevents them from raising it here and claiming that a conflict in the circuits exists.

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[6]Petitioners have also failed to point out that they encouraged their employees to remain on the premises after their shifts, and to socialize in the bars with fellow employees or supervisors (Pet. App. 48). Certainly, the petitioners cannot prohibit solicitations under such circumstances. *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952) enf. denied in part, 200 F.2d 375 (7th Cir., 1952), also *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 506 (1978).

Secondly, even if the issue had been raised below, the decisions were correct. Although petitioners promulgated a rule relating both to solicitations *and* distribution of literature (Pet. App. 48, 103), the proceedings below challenged only the portion of the rule relating to employee solicitations. The challenged portion of the rule in question stated:

> "Solicitations on company premises by employees after employees shift has been completed is prohibited.
>
> • • • • •
>
> Violation of any of the above rules will result in immediate disciplinary action, including discharge.[1]

The Board, with court approval, has long recognized that rules governing oral solicitations are necessarily different from those governing distribution of literature, and that less employer infringement is tolerated in the area of oral solicitations. *Stoddard-Quirk Manufacturing Corp.*, 138 N.L.R.B. 615 (1962). Petitioners have ignored this distinction, and premise their argument on decisions involving distribution of literature on the employer's premises. No case cited by petitioners requires the Board or

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[1]The portion of the rule *not* at issue here states (Pet. App. 48, 103:

> Solicitations of any type by employees during working time is prohibited.
>
> • • • • •
>
> Distribution of literature of any type or description by employees during working time is prohibited.
>
> Distribution of literature of any type or description in working areas is prohibited.

court to consider alternate means of communication in the context of an oral solicitation rule.[8]

Petitioners' argument also ignores the fact that they were unable to establish any "special circumstances" to justify a complete ban on employee solicitations during nonworking hours in areas where they actually encouraged employees to be. (Pet. App. 48). In *McDonnell Douglas Corporation v. N.L.R.B.*, 474 F.2d 539, 545 (8th Cir., 1973) (Pet. 21, 25),[9] the court emphasized that before the Board engaged in any "balancing" or consideration of alternate means of communication, it was incumbent on the employer to make a "creditable showing of special, justifying circumstances." Thus, the Board and court's decisions were proper in light of petitioners' failure to make any showing of "special circumstances" to justify their broad no-solicitation and no-distribution rules.

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[8]Petitioners cite several cases immaterial here. *N.L.R.B. v. Rockwell Manufacturing Co.*, 271 F.2d 109 (3rd Cir., 1959) (Pet. 24) and *Babcock v. Wilcox Co.*, 351 U.S. 108 (1956) (Pet. 25) both involved rules forbidding distribution of literature by employees or union organizers on company premises. No such issue is involved here. *N.L.R.B. v. United Steelworkers of America* 357 U.S. 357 (1958) (Pet. 25) involved a facially *valid* no-solicitation and no-distribution rule. The issue involved discriminatory enforcement of the rule; the rule was enforced against the union and employees, but violated by the employer. Here, the rule in question is facially invalid.

[9]The dispute in *McDonnell* arose when an insurgent union official attempted to distribute literature on the employer's premises. The no-solicitation, no-distribution rule there was *less* restrictive than the rule under consideration here because it permitted oral solicitations during nonworking hours. Moreover, the employer in *McDonnell* was able to establish "special circumstances" for the no-distribution rule based on the military sensitivity of its operation. No such showing was made in the present case.

CONCLUSION

For all of the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition; the Petition for Writ of Certiorari should be denied.

January 30, 1981

Respectfully submitted,

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